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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TALMUS R. TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: September 20, 2007

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QUESTION PRESENTED

Whether, in determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district judges to provide progressively more compelling justification under factors listed in 18 U.S.C. § 3553(a) the farther the judge's sentence departs from the United States Sentencing Guidelines.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Talmus R. Taylor respectfully requests that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Taylor*, --- F.3d ---, 2007 WL 2349415 (C.A. 1 (Mass.)) and is reproduced in Appendix A (Pet. App. 1a) to this Petition. The judgment of the court of appeals is reproduced at Appendix B (Pet. App. 22a). The district court's written statement of reasons is reproduced at Appendix C (Pet. App. 24a). The oral statement of reasons given by the court at the time of sentencing is reproduced at Appendix D (Pet. App. 30a).

STATEMENT OF JURISDICTION

The First Circuit's decision vacating petitioner's sentence was issued on August 17, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. — The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider —

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed —

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for —

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines —

(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

amendments issued under section 994 (p) of title 2[illegible] and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement —

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records

who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * *

(c) Statement of Reasons for Imposing a Sentence. — The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence —

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public

record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * *

18 U.S.C. § 3742. Review of a sentence

* * * *

(e) Consideration. — Upon review of the record, the court of appeals shall determine whether the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that —

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553 (c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

* * * *

STATEMENT OF THE CASE

This case presents the Court with an important issue similar to the issue on which this Court has recently granted certiorari in *Gall v. United* States, No. 06-7949, 127 S.Ct. 2933 (2007). The issue is whether, in determining the reasonableness of a

district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district judges to provide progressively more compelling justification under factors listed in 18 U.S.C. § 3553(a) the farther the judge's sentence departs from the United States Sentencing Guidelines.

Petitioner was found guilty, by a jury, of sixteen counts of aiding and assisting in the preparation of false tax returns. At the time that the offenses were committed, petitioner was a full-time elementary music teacher in the Boston Public Schools and worked as a part-time income tax preparer. Pet. App. 2a.

The pre-sentence report calculated a total offense level of 19 by adding a base offense level of 15, U.S.S.G. § 2T4.1(J), a 2-level enhancement for being in the business of preparing tax returns, U.S.S.G. § 2T1.4(b)(1)(B), and a 2-level enhancement for obstruction of justice on the ground that petitioner had counseled two witnesses to falsify evidence and lie to the IRS, U.S.S.G. § 3C1.1. Because petitioner had no criminal history, the guideline range was 30 to 37 months imprisonment. *Id.* at 3a-4a.

The court heard from two witnesses called by petitioner: his school principal and the president of the Boston Teachers Union. Both testified from extensive personal knowledge that petitioner was an extraordinary teacher who, because of his commitment to his work and his involvement in school activities, would be irreplaceable. The court also received forty-eight letters from current and former administrators and teachers in his school and the school system, colleagues, parents and students,

friends, family members, members of his church, and members of the community. All of the letters unequivocally stated that this crime was an aberration for petitioner and that he was generally a law-abiding person. Some individuals told how petitioner had played a very important role as a teacher at his school, that he was loved by his students, and that he often went above and beyond his job duties. *Id.* at 4a-5a.

Of particular significance was a letter from the Boston Public Schools, which the court of appeals characterized as "striking testimony to Taylor's contributions to his school," which indicated that petitioner would be allowed to continue teaching if he was not sent to prison, notwithstanding the fact that he had been found guilty of fraud. *Id.* at 11a.

After hearing from all parties and the petitioner, the district judge acknowledged at the outset that "I have a particularly difficult sentence here because the crime is a serious one." *Id.* at 31a. She observed that "[petitioner's] made a huge difference, and I got letters from parents, and I got letters from other teachers, and I got letters from colleagues in church." *Id.* at 32a. The court concluded: "So what I think the reasonable thing to do here, taking into account the fantastic contributions he's made to the community but also the perjury and the tax fraud, is that I think that a term in a halfway house would accommodate the competing interests here, if you will." *Id.* In its Statement of Reasons, *Id.* at 28a, the court found that "[petitioner] has provided exceptional and extraordinary community service as a music teacher in the Boston Public Schools in Dorchester, Massachusetts." The court concluded that "pursuant to 18 U.S.C. § 3553(a), a half-way

house for one year with five years of probation, the requirement of five hours of community service (like teaching trumpet to children in under-serviced youth centers), and a $10,000 fine (with interest) will reasonably meet the goals of punishment, deterrence and protection to the public." *Id.* at 29a.

On appeal, the First Circuit stated that the district court had given "proper weight to the Guidelines." *Id.* at 12a. Nevertheless, the court vacated the sentence and remanded for resentencing, holding that the district court had not taken "proper account of all the factors listed in 18 U.S.C. § 3553(a)." *Id.* at 21a. In its ruling the court relied on the proposition that "[t]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." (quoting *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005)). Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

Like the Eighth Circuit in *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006),[1] the First Circuit requires a progressively stronger justification for a below guideline sentence the farther the sentence departs from the guideline range. "[T]he farther the judge's sentence departs from the guidelines

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[1] "The farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006).

sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." (quoting *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). Pet. App. 13a.

In *United States v. Gall* the court held that "this extraordinary variance" (a sentence of probation when the guideline range was 30-37 months imprisonment) was not supported by "extraordinary justifications." *Id.* at 889. To support its conclusion, the court cited four instances where the district judge had accorded improper weight or emphasis to sentencing factors: "First, the district court gave too much weight to Gall's withdrawal from the conspiracy . . ." *Id.* at 889-890. "Second, the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in ill-considered actions." *Id.* at 890. "Third, the district court did not properly weigh the seriousness of Gall's offense." *Id.* "Fourth, the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities." *Id.*

In the instant case, as in *Gall*, the court of appeals disagreed with the weight or emphasis the district judge gave to the sentencing factors: "[W]e do not view the sentence as having given full consideration to the nature and circumstances of Taylor's crime." Pet. App. 17a-18a; "[W]e believe the district court accorded incommensurate weight to the fact that Taylor's absence from school would negatively affect his students." *Id.* at 18a. "We do not see why Taylor is an aberration from the overall conclusion that the

threat of jail time deters white-collar crime, and thus we are not convinced that a non-jail sentence for Taylor would adequately serve the goal of general deterrence." *Id.* at 19a-20a. "Finally, we are unpersuaded that this sentence reasonably reflects 'the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.'" *Id.* at 20a. The court concluded that the reasons offered by the district judge were not sufficiently compelling to justify the sentence imposed in that the court had failed to take "proper account of all the factors listed in 18 U.S.C. § 3553(a)." *Id.* at 21a.

In determining whether the petitioner's sentence was unreasonable, the court of appeals first determined whether the district judge had correctly interpreted the Sentencing Commission policy statement embodied in U.S.S.G. § 5H.11. *Id.* at 10a. The court found that the judge had correctly determined that petitioner's work as an educator was "extraordinary" and that "§ 5H.11 militated in favor of a lower sentence." *Id.* at 11a-12a. It also determined that the district court had given proper weight to the Guidelines. *Id.* at 12a. But then the court of appeals proceeded to determine that, while a downward departure was supported by extraordinary justifications, those justifications were not extraordinary *enough* to justify the sentence imposed. That is, the court required that the district judge offer not only more explanation, a "reasoned explanation" as the court styles it, *id.* at 21a, but also that the judge articulate a greater degree of extraordinariness to move the sentence across some undefined boundary of reasonableness. In effect, the court of appeals resurrected the *de novo* review

of 18 U.S.C. § 3742(e) excised by *United States v. Booker*, 543 U.S. 220, 259 (2005).

By granting certiorari in *Gall v. United States*, No. 06-7949, 127 S.Ct. 2933 (2007), this Court has acknowledged the significant legal and constitutional issues that are implicated when courts of appeals require that sentences which vary substantially from the Guidelines be justified by extraordinary circumstances. With the First Circuit's acknowledgement in this case that petitioner's circumstances were extraordinary, the issue is squarely presented whether it is appropriate, in the wake of *Booker*, for courts of appeals to make their own qualitative judgments about the degree of extraordinariness required to affirm a district court sentence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Should the Court decide not to grant the petition at this time, it should postpone consideration of the petition until its decision in *Gall v. United States*.

Respectfully submitted,

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September 20, 2007

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 06-2216

UNITED STATES OF AMERICA,

Appellant,

v.

TALMUS R. TAYLOR,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS
[Hon. Patti B. Saris, U.S. District Judge]

Before
Torruella, Circuit Judge,
Newman* and Lynch, Circuit Judges.

John A. Capin, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief, for appellant.
Bruce T. Macdonald, for appellee.

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* Of the Federal Circuit, sitting by designation.

Elizabeth L. Prevett and Miriam Conrad, Federal Public Defender, Federal Defenders Office, were on brief as amicus curiae in support of appellee.

August 17, 2007

TORRUELLA, Circuit Judge. Talmus R. Taylor was tried and convicted of sixteen counts of aiding and assisting in the preparation of false tax returns, a violation of 26 U.S.C. § 7206(2). The district court sentenced Taylor to one year in a halfway house, five years of probation, and a $10,000 fine. The Government now appeals Taylor's sentence, claiming that it is substantively unreasonable. After careful consideration, we conclude that a non-jail sentence was unreasonable in light of the district court's explanation and the factors the court was obligated to consider under 18 U.S.C. § 3553(a).

I. Background

In 1997, Taylor, a teacher at Fifield Elementary School in Dorchester, Massachusetts, took a second job as a part-time income tax preparer. In this capacity, Taylor submitted federal tax returns on behalf of his clients. Many of the returns submitted by Taylor claimed deductions for charitable contributions of $9,000 to $19,000 worth of goods per year to Goodwill, donations which his clients had not in fact made. The false claims were accompanied by handwritten lists that purported to be records of specific contributions along with their alleged value.

When the Internal Revenue Service ("IRS") noticed a suspicious pattern in the returns prepared

by Taylor -- in some cases, the lists of contributions submitted with one person's return were identical to lists submitted with another's return -- they questioned Taylor. Taylor told the IRS that it was his clients who had provided the fraudulent lists of deductions, and that he had simply served as a scrivener. When confronted with the fact that many of the lists were identical, Taylor explained that he had mixed up documents at the copier, even though the lists had been submitted months apart. According to testimony, Taylor then asked his clients to provide false information to the IRS by, inter alia, filling out blank receipts obtained from Goodwill and forging the signature of Goodwill employees. The IRS did not believe Taylor's explanations for the discrepancies, and he was later arrested and charged with sixteen counts of tax fraud.

At trial, Taylor's clients testified that he had prepared the lists of deductions and that he had later asked them to lie to IRS agents if they asked about the returns. Taylor's clients also stated that before Taylor had filled out their tax returns and afterwards, they had never falsely claimed a charitable contribution. The clients testified that after the tax fraud was discovered, they were left with tax liabilities of, on average, $2,000 for each year that Taylor prepared their returns.

Taylor testified on his own behalf, denying involvement in any fraudulent scheme. The jury returned a verdict finding Taylor guilty on sixteen counts of aiding in the preparation of false tax returns. The jury further found that the aggregate value of the fraud -- the amount of taxes not paid to the Government -- was $129,879.

The Probation Office prepared a pre-sentence report ("PSR") for Taylor. The PSR calculated a total offense level of 19 by adding a base offense level of

15, U.S.S.G. § 2T4.1(J), a 2-level enhancement for being in the business of preparing tax returns, U.S.S.G. § 2T1.4(b)(1)(B), and a 2-level enhancement for obstruction of justice on the ground that Taylor counseled two witnesses to falsify evidence and lie to the IRS, U.S.S.G. § 3C1.1. Taking into account that Taylor had no criminal history, the sentencing range under the advisory Sentencing Guidelines was 30 to 37 months in prison, one year of supervised release, and a fine of up to $60,000.

Taylor submitted a sentencing memorandum to the court suggesting that it depart from the sentencing guidelines and give him no jail time at all. Taylor offered a letter from Boston Public Schools stating that, based on the nature of his crime, Taylor would continue to be eligible for employment in the schools if he was not incarcerated. In addition, Taylor provided forty-eight letters from the president of the Boston Teachers Union, various current and former administrators and teachers in his school and the school system, parents and students, friends, colleagues, family members, members of his church, and members of the community. These letters all unequivocally stated that this crime was an aberration for Taylor, and that he was generally a law-abiding person. Some of the letters noted that Taylor had played a very important role as a teacher at Fifield, that he was loved by students, and that Taylor often went above and beyond his job duties in organizing concerts and field trips for students, and in leading the school chorus and the band. Other letters stated that Taylor was the guardian for his mentally disabled brother, and that he had provided aid and comfort to many members of the community in their times of need.

At the sentencing hearing, a colleague of Taylor and Taylor's principal both testified on his behalf. The witnesses mostly repeated what was said in the letters, but added that although they would likely be able to find a new music teacher, Taylor was irreplaceable, and that they felt it unlikely that they would find someone who would put in as much time as Taylor did. In addition, the witnesses noted that Taylor was African-American and that he was a good role model to students in his school, who often did not encounter educated and professional African Americans. The Government argued that while Taylor had made significant contributions to his community and while this might warrant a somewhat lower sentence, Taylor's case still merited some amount of jail time so as to deter future offenders and to reflect the seriousness of the offense. In particular, the Government noted that Taylor had not accepted responsibility for his actions and that he had lied about his role in the fraud throughout the case. Finally, Taylor made a brief statement to the court, stating that he was "embarrassed," and that he was "sorry that [he had] actually put [his] job into jeopardy as a music teacher." Taylor noted that he loved his job and wanted to continue working as a teacher in the schools.

The court decided to impose a sentence of five years probation, including five hours a week of community service and one year in a "halfway house," and a fine of $10,000. The court offered as justification for the sentence its belief that

> [Taylor's] level of service to the community is extraordinary community involvement which involves a traditional departure ground. I also

> think that if for some reason the appellate court did not think that it was a traditional departure ground because they felt it doesn't rise to the level of extraordinary, I would do it on the basis of a variance on the history and characteristics of the offender and the need to impose a punishment that is adequate but not [greater than necessary.] . . . I'm particularly not giving straight probation because I think that it's a serious crime, but I think that this is a way in which he can continue to give back to the community, and yet it will send that signal that the Government was correctly worried about to the world that you can't commit tax fraud and commit perjury and basically get straight probation.

The Government then objected to the sentence on the ground that it was not reasonable. The court overruled the Government's objection, and this appeal ensued.

II. Discussion

A. Standard of Review

First, we must discern the proper standard of review to apply to Taylor's sentence. The Government urges us to bifurcate our review, looking first to determine whether the district court abused its discretion in "departing" from the Sentencing Guidelines recommendation, and then reviewing the ultimate sentence for "reasonableness." Taylor, on the other hand, argues

that we should eschew independent review of departures, and engage only in reasonableness review of the end product. Ultimately, because reasonableness review is not easily distinguishable from review for abuse of discretion, see Rita v. United States, 127 S. Ct. 2456, 2470-71 (2007) (Stevens, J., concurring) ("Simply stated, Booker replaced the de novo standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard that we called 'reasonableness' review." (quoting United States v. Booker, 543 U.S. 220, 262 (2005))), Taylor and the Government differ only as to whether or not an independent review of "departures" is merited.

The Government finds support for independent review of departures in the history of the sentencing statutes. Prior to the enactment of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. 108-21, 117 Stat. 650 (2003), we reviewed decisions to depart upwards or downwards from the sentencing guidelines for abuse of discretion. See, e.g., United States v. Rodríguez, 327 F.3d 52, 55 (1st Cir. 2003). After passage of the PROTECT Act, courts of appeal reviewed out-of-Guidelines sentences de novo. 117 Stat. at 670, codified at 18 U.S.C. § 3742(e). However, in Booker, the Supreme Court severed and excised § 3742(e), finding that the effect of the de novo review standard was to "make Guidelines sentencing even more mandatory than it had been" and concluding that it "ceased to be relevant." 543 U.S. at 261. Although Booker extensively discussed the standard of review to be applied to sentencing appeals, the Court did not explicitly decide whether courts of appeal should return to the pre-PROTECT Act standard of review. Rather, it simply stated that

> the [pre-PROTECT Act] text told appellate courts to determine whether the sentence "is unreasonable" with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

Id. at 261.

In the absence of explicit instructions from the Supreme Court, the Government argues, and some of our sister circuits have concluded, that the proper course of action is to revert to the pre-PROTECT Act standard, which separately reviewed Sentencing Guidelines departures for abuse of discretion. See, e.g., United States v. Wolfe, 435 F.3d 1289, 1295 n.5 (10th Cir. 2006) (explaining history of sentencing statutes and concluding that departures should be reviewed for abuse of discretion); see also United States v. Shan Wei Yu, 484 F.3d 979, 987 (8th Cir. 2007); United States v. Husein, 478 F.3d 318, 325-326 (6th Cir. 2007); United States v. Crisp, 454 F.3d 1285, 1288 (11th Cir. 2006); United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006); United States v. Fuller, 426 F.3d 556, 562 (2d Cir. 2005). Two circuits, however, have eliminated separate review of departures under the Guidelines, concluding that post-Booker, independent review of Sentencing Guidelines "departures" largely replicates reasonableness review. See United States v. Mohamed, 459 F.3d 979, 987 (9th Cir. 2006) ("If we were to declare the sentence unreasonable, then the sentence would be invalid both because of the

erroneous departure and because it is unreasonable. In any case, our review of the so-called departure would have little or no independent value." (emphasis in original)); United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005) ("It is now clear that after Booker what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-Booker decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.").

We agree that the concept of "departures" is somewhat "outmoded" in the post-Booker world. See United States v. Rinaldi, 461 F.3d 922, 929 (7th Cir. 2006). However, district courts are still required by § 3553(a)(5) to consider policy statements issued by the Sentencing Commission, and many of the traditional grounds for "departure" under the Sentencing Guidelines are, in fact, policy statements. District courts must properly interpret those policy statements (if they are relevant) and apply them to the facts of each case. See, e.g., United States v. Thurston ("Thurston I"), 358 F.3d 51, 78-79 (1st Cir. 2004) (holding that U.S.S.G. § 5H1.11 states that courts should impose lower sentences only for "extraordinary" good works), vacated and remanded in light of Booker, 543 U.S. 1097 (2005). Thus, at times, we may need to refer to our extensive body of departure-related law to independently determine whether a district court has complied with its obligation under § 3553(a)(5) to consider Sentencing Commission policy statements. As such, we cannot agree with the Seventh and Ninth circuits that appellate courts should never, as part of their reasonableness analyses, engage in an independent review of whether a district court properly

interpreted the Sentencing Commission's policy statements in determining a sentence.

Thus, we think that where a party challenges a sentence as unreasonable because a district court has misconstrued a Sentencing Commission policy statement, appellate review should consist of determining whether a district court has correctly interpreted the policy statement and whether it has reasonably applied the policy statement to the facts of the case. Once we have determined that a district court has complied with its statutory obligation to correctly consider the Sentencing Commission policy statements, appellate review of the ultimate sentence, including the weighing of those policy statements against the other § 3553(a) factors, should be for "reasonableness." Booker, 543 U.S. at 261.[1]

B. Did the District Court Properly Interpret U.S.S.G. § 5H1.11?

The Government argues that the district court misinterpreted U.S.S.G. § 5H1.11, and thus erroneously considered it to militate in favor of a

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[1] The Government also argues that appellate courts may not review a district court's decision to choose a lower (or higher) sentence based on a Sentencing Guidelines policy statement. We find this argument unusual, given that it would moot the Government's appeal inasmuch as the district court imposed a lower sentence on Taylor based on such a policy statement. While it is true that under existing circuit precedent, we may not review a district court's discretionary decision to find that a Sentencing Guidelines policy statement does not merit a sentence reduction in a particular defendant's case, United States v. Meléndez-Torres, 420 F.3d 45,50-51 (1st Cir. 2005), this is beside the point. A sentence which takes into account a Sentencing Guidelines policy statement is ,like all other sentences, subject to review for reasonableness.

lower sentence in this case. U.S.S.G. § 5H1.11 is a policy statement of the Sentencing Commission and states, "[C]ivic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted." We have interpreted § 5H1.11 to apply only to extraordinary civic and charitable contributions. See Thurston I, 358 F.3d at 78-79; see also U.S.S.G. § 5K2.0(a)(4) ("An offender characteristic . . . not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree."). The district court appears to have properly interpreted the policy statement, given its statement that it considered § 5H1.11 to apply because of Taylor's "extraordinary" good works.

In deciding whether U.S.S.G. § 5H1.11 applied to the facts of Taylor's case, the district court noted that people from all walks of life wrote to the court to attest to the fact that Taylor had gone out of his way to help them and the community. Many of Taylor's students and colleagues also wrote and testified, explaining his importance to the school as a music teacher and that he had often gone above and beyond his job duties to organize concerts for pupils. Perhaps the most striking testimony to Taylor's contributions to his school was contained in a letter from the Boston Public Schools indicating that Taylor would be allowed to continue teaching if he was not sent to prison, notwithstanding the fact that he had been found guilty of fraud. In light of the testimony at Taylor's sentencing hearing and the vast number of letters documenting Taylor's extensive service to his community, we believe that the district court reasonably interpreted the facts to

find that Taylor had engaged in extraordinary good works, and that as such, U.S.S.G. § 5H1.11 militated in favor of a lower sentence. Cf. United States v. Canova, 412 F.3d 331, 343 (2d Cir. 2005) (finding that a defendant had engaged in extraordinary good works "which included six years' service in the United States Marine Corps, 'exemplary and many times courageous service' as a volunteer firefighter, and Good Samaritan aid to 'three total strangers who were in extreme medical distress.'"). Although another judge might have decided otherwise, we conclude that the district court's determination was a reasonable interpretation of the facts before it.

C. Was Taylor's Sentence Unreasonable?

Because the district court properly calculated the advisory Sentencing Guidelines range and correctly interpreted the relevant Sentencing Commission policy statements, and because there is no dispute that the court gave proper weight to the Guidelines, the only remaining question at issue in this appeal is whether the court's sentence was "reasonable." Jiménez-Beltre, 440 F.3d at 518 ("Booker's remedial solution makes it possible for courts to impose non-guideline sentences that override the guidelines, subject only to the ultimate requirement of reasonableness."); see also United States v. Trupin, 475 F.3d 71, 74 (2d Cir. 2007) (reviewing a sentence for reasonableness after determining that "[n]either the way in which the district court performed its duty to consider the section 3553(a) factors nor its Guidelines calculation is at issue").

In past cases, we have attempted, mostly in general terms, to describe how a district judge might arrive at a reasonable sentence for a defendant. We have expressed the need for district courts to provide

a "plausible explanation and a defensible overall result." Jiménez-Beltre, 440 F.3d at 519. And although the Guidelines are not presumptively reasonable in this Circuit, see id. at 518, we have also agreed with Judge Posner's statement that "[t]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006) (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.)).[2]

Notwithstanding these general pronouncements, we have tended to eschew more specific guidance, recognizing that judges must consider each defendant and his or her crime individually. See Jiménez-Beltre, 440 F.3d at 528 n.10 ("[W]e required, even before Booker, that a court's explanation of its sentence 'sufficiently show a thoughtful exercise of the court's sentencing responsibility and a degree of care and individualized attention appropriate to the solemnity of the sentencing task.'" (quoting United States v. Vázquez-Molina, 389 F.3d 54, 59 (1st Cir. 2004))); see also United States v. Vázquez-Rivera, 470 F.3d

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[2] In Rita, 127 S. Ct. at 2463, the Supreme Court held that it was permissible for an appellate court to presume that if "both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case[,] . . . . [t]hat double determination significantly increases the likelihood that the sentence is a reasonable one." However, the Supreme Court's opinion does not require such a presumption to be adopted, id. at 2468 (noting that "[s]everal courts of appeals have . . . rejected a presumption of unreasonableness"), and we have declined to adopt one, Jiménez-Beltre, 440 F.3d at 518.

443, 449 (1st Cir. 2006) (Howard, J., concurring) ("District courts will inevitably approach sentencing differently post-Booker. Indeed, the legitimacy of a range of approaches is implicit in Booker's grant of added discretion to sentencing judges."). But see United States v. Thurston (Thurston II), 456 F.3d 211, 220 (1st Cir. 2006) ("Having reviewed the record, the recommended guideline sentence, and the § 3553(a) factors, we conclude that a sentence of fewer than 36 months' imprisonment would fail reasonableness review in the present circumstances."). We leave broad discretion to a district judge to determine an appropriate sentence because he or she will ordinarily have observed a trial from its inception, becoming intimately aware of the facts and the players involved.[3]

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[3] The discretion left to district judges in the wake of Booker,543 U.S. 220, is not a particularly new development. Prior to the creation of the Sentencing Guidelines regime in the late 1980s,judges were given almost unfettered (and unreviewable) discretion to impose sentences as they saw fit. See generally Mistretta v. United States, 488 U.S. 361, 363-65 (1989) (reviewing history of sentencing in United States); Douglas Berman, Conceptualizing Booker, 38 Ariz. St. L.J. 387, 388 (2006) ("From the late nineteenth-century and throughout the first three-quarters of the twentieth-century, trial judges in both federal and state systems were given nearly unfettered discretion to impose any sentence from within broad statutory ranges provided for criminal offenses."). This discretion, however, led to "[s]erious disparities in sentences." Mistretta, 488 U.S. at 365; see also Berman, supra at 393 ("[S]ome studies found that personal factors such as an offender's race, gender and socioeconomic status were impacting sentencing outcomes and accounted for certain disparities."). As a result, in determining a sentence, judges must now consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6). A judge must also continue to consider the sentencing guidelines, id. § 3553(a)(4)-(5), which reflect "the

See Rita, 127 S. Ct. at 2469 ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."). In addition, a district judge will ordinarily be involved in sentencing on a far more regular basis than appellate judges, and thus will have a better eye for the ins and outs of criminal conduct and those who engage in it. Thus, a district court will be best placed to make the sorts of individualized determinations that allow the imposition of a sentence that is sufficient, but no greater than necessary, to achieve the stated purposes of 18 U.S.C. § 3553(a). Unwarranted interference in this process is likely to hinder individualized consideration and result in one-size-fits-all sentencing, an approach that was rejected long ago. See Williams v. New York, 337 U.S. 241, 247 (1949) ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.").

Turning to the case at hand, the district court decided that a sentence of probation and time in a halfway house was appropriate for Taylor, citing both U.S.S.G. § 5H1.11 and its belief that a "non-guidelines sentence" would best serve the sentencing goals listed in 18 U.S.C. § 3553(a).[4]

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increased uniformity of sentencing that Congress intended its Guidelines system to achieve," Booker, 543 U.S. at 246.

[4] We wonder, however, whether terming a sentence "guideline" or "non-guideline" appropriately reflects the proper role of the sentencing guidelines post-Booker. While the sentencing guidelines are to be accorded substantial weight, see United States v. Vázquez-Rivera, 470 F.3d 443, 449 (1st Cir. 2006), and can be used as a starting point in the sentencing process, see United States v. Parrilla Román, 485 F.3d 185, 190 (1st Cir. 2007), the Guidelines are but one factor

Under 18 U.S.C. § 3553(a)(5), it was proper for the district court to consider Taylor's extraordinary good works pursuant to U.S.S.G. § 5H1.11, and in Thurston II, we stated that a district court might also consider ordinary charitable activities and good works as part of the "history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). 456 F.3d at 219.

While these ordinary and extraordinary contributions to the community may have justified a sentence with less imprisonment than an otherwise similarly situated defendant, we cannot sustain the ultimate sentence imposed on Taylor based on the factors identified by the district court. In explaining its ultimate sentence, the district court noted that Taylor had committed a serious offense, and that he had lied in court. The court also noted that under the sentencing guidelines, which were considered as part of the sentencing process, the recommended sentence for Taylor was 30 to 37 months in prison. The court explained, however, that it did not feel that a sentence of jail time was appropriate because of the "fantastic contribution he has made to the community." Although we do not wish to unduly constrain the district court's sentencing discretion on remand, we do not think that these factors make Taylor's sentence of probation a plausible result. See United States v. Scherrer, 444 F.3d 91, 93 (1st Cir.

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in the sentencing analysis, 18 U.S.C. § 3553(a)(4), a sentence outside of the guidelines need not be justified by unusual or extraordinary reasons, see Vázquez-Rivera, 470 F.3d at449, and a within-guidelines sentence will not be considered presumptively reasonable by this court, see Jiménez-Beltre, 440F.3d at 518. Thus, we do not find the term "non-guidelines sentence" to be useful except to the extent that it expresses the sentencing court's consideration that the advisory Guidelines recommendation was outweighed by other § 3553(a) factors.

2006) ("[O]ur main concern is whether the court has adequately explained its reasons for varying or declining to vary from the guidelines and whether the result is within reasonable limits."). We briefly explain.

The offense that Taylor committed no less than sixteen times over a four-year period -- fraudulent preparation of tax returns -- is a serious crime. While tax fraud is not violent in nature, at its heart, it is theft, specifically theft of money to which the public is entitled. See Trupin, 475 F.3d at 76 (noting that the defendant "in effect stole from his fellow taxpayers through his deceptions" and that "[a] seven-month term of imprisonment fails to reflect as much"). Furthermore, the tax fraud committed here was not part of an indigent's effort to avoid personal tax liability, but rather, the supplemental business of a moderately successful man who misled his clients. Cf. United States v. Thurman, 179 Fed. Appx. 971, 972 (7th Cir. 2006) (noting with approval that "[t]he district court concluded that because Thurman was not selling drugs to support his own addiction, but instead as an illegal business, his crime was more offensive in nature"). In addition, as the district court recognized, Taylor repeatedly obstructed justice during the course of the investigation and the trial by asking his clients to misinform the IRS and provide inaccurate testimony. See Rinaldi, 461 F.3d at 931 (finding reasonable a district court's consideration of the defendant's obstruction of justice as a factor meriting a higher sentence); United States v. Bradstreet, 135 F.3d 46, 57 (1st Cir. 1998) ("One convicted of criminal dishonesty is therefore not entitled to an aberrant conduct departure if he has testified dishonestly about his criminal conduct."). Moreover, the trial transcript provides no indication

whatsoever that Taylor has accepted responsibility for his actions. To put it succinctly, we do not view the sentence as having given full consideration to the nature and circumstances of Taylor's crime, 18 U.S.C. § 3553(a)(1), and the need to reflect its seriousness, 18 U.S.C. § 3553(a)(2)(A).

In addition, we believe that the district court accorded incommensurate weight to the fact that Taylor's absence from school would negatively affect his students. We need not decide whether, in considering the history and characteristics of the defendant, a court may consider the effect of the defendant's incarceration on others. Cf. United States v. Holz, 118 Fed. Appx. 928, 935-36 (6th Cir. 2004) (deciding that a court may consider the impact on a defendant's business and employees when imposing a sentence). However, if a district court did take such an impact into consideration, we think it would also have been necessary to consider the fact that "[i]t is not extraordinary that in the area of white collar crime, a principal's business and employees may suffer if he is incarcerated." United States v. Pool, 474 F.3d 1127, 1129 (8th Cir. 2007).

Furthermore, the court was also obligated to consider whether Taylor's sentence would serve the purpose of providing "adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2) (B). In particular, we have recognized that "deterrence of white-collar crime [is] of central concern to Congress." United States v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006). When passing the Sentencing Reform Act, Congress explained:

> [It is our] view that in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted

> because the offender required little or nothing in the way of institutionalized rehabilitative measures . . . and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of [a white collar criminal] may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact.

S. Rep. No. 98-225, at 91-92 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3274-75; see also United States v. Martin, 455 F.3d 1227, 1240-41 (11th Cir. 2006) (considering the Senate Report and adding that "Rather than deter crime by others, [the defendant's] 7-day sentence suggests that those similarly situated . . . could profit from fraudulent conduct"); Thurston II, 456 F.3d at 218 (noting that Congress has concluded that prison sentences tend to deter white-collar criminals).[5]

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[5] As we noted in Thurston II, although a district court might disagree with the link between prison sentences and deterrence of white-collar crime, its focus should be on the individual

We do not see why Taylor is an aberration from the overall conclusion that the threat of jail time deters white-collar crime, and thus we are not convinced that a non-jail sentence for Taylor would adequately serve the goal of general deterrence.

Finally, we are unpersuaded that this sentence reasonably reflects "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[6]

18 U.S.C. § 3553(a)(6). The Sentencing Guidelines highlight the problem:

> Under pre-guidelines practice, roughly half of all tax evaders were sentenced to

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characteristics of the defendant, rather than general policy considerations. 456 F.3d at 218.

[6] Taylor cites various cases in which other defendants have received somewhat lower sentences for their past good works. See, e.g., United States v. Canova, 412 F.3d 331 (2d Cir. 2005); United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). While these cases are persuasive inasmuch as they have held that a defendant's good works are a permissible consideration in the sentencing process, we do not believe them to be apt comparisons for the purpose of establishing that Taylor's sentence is or is not within the norm. As we have explained, the focus of § 3553(a)(6) is on nationwide sentencing disparities, rather than disparities between the sentences given to individual defendants. See Thurston II, 456F.3d at 216.

To the extent that Taylor offers these cases to show that his sentence is reasonable, we respond that they are no more probative of reasonableness than cases in which courts have rejected appeals by defendants challenging their sentences as too high in light of their good works, see, e.g., United States v. Baxter, 217 Fed. Appx. 557 (7th Cir. 2007), or cases in which courts have found sentences unreasonable on the ground that they excessively relied on a defendant's good works, see, e.g., United States v. Mallon, 345 F.3d 943, 949 (7th Cir. 2003). In the post-Booker world, sentencing must be truly individualized.

> probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length.

U.S.S.G. § 2T1.1 background note. In addition, courts have recognized that "the minimization of discrepancies between white- and blue-collar offenses" is an important goal in the sentencing process. Mueffelman, 470 F.3d at 40; see also Thurston I, 358 F.3d at 80. We recognize that because of Taylor's extraordinary service to the community, he may not be easily comparable to "defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). However, it is important to recognize that persons convicted of white collar crimes "are often expected, by virtue of their positions, to engage in civic and charitable activities." Thurston I, 358 F.3d at 80.

Thus, we conclude that the district court should resentence Taylor by taking proper account of all of the factors listed in 18 U.S.C. § 3553(a) and providing a reasoned explanation for its result.

III. Conclusion

For the foregoing reasons, we vacate the sentence of the district court and remand for resentencing.

Vacated and Remanded.

APPENDIX B

United States Court of Appeals
For the First Circuit

MANDATE

No. 06-2216

UNITED STATES OF AMERICA,

Appellant,

v.

TALMUS R. TAYLOR,

Defendant, Appellee.

JUDGMENT

Entered: August 17, 2007

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The sentence imposed by the district court is vacated, and the case is remanded fro resentencing consistent with the opinion issued this day.

By the Court:

/s/ Richard Cushing Donovan, Clerk

Certified and Issued as Mandate under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

/s/
Deputy Clerk

Date: SEP 07 2007

[Certified copies to Hon. Patti B. Saris and Ms. Sarah A. Thornton, Clerk, United States District Court for the District of Massachusetts. Copies to Mr. Capin, Mr. Pineault, Ms. Chaitowitz, mr. MacDonald, Ms. Conrad, & Ms. Prevett.]

APPENDIX C

DEFENDANT: TALMUS R. TAYLOR
CASE NUMBER: 1: 05 CR 10067 – 001 – PBS
DISTRICT: MASSACHUSETTS

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☑ The court adopts the presentence investigation report without change.

. . . . .

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A ☑ No count of conviction carries a mandatory minimum sentence.

. . . . .

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

. . . . .

C ☑ The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)

. . . . .

V **DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES** (If applicable.)

A **The sentence imposed departs** (Check only one.):

☑ below the advisory guideline range

. . . . .

B **Departure based on** (Check all that apply.):

3 **Other**

☑ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

. . . . .

☑ 5H1.11 Military Record, Charitable Service, Good Works

. . . . .

D **Explain the facts justifying the departure.** (Use Section VIII if necessary.)

3. Other: DEFENDANT RAISED COMMUNITY SERVICE IN HIS SENTENCING MEMO

D. OTHER FACTS JUSTIFYING DEPARTURE: SEE ATTACHMENT A.

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM (Check all that apply.)

A **The sentence imposed is** (Check only one.):

☑ below the advisory guideline range

B **Sentence imposed pursuant to** (Check all that apply.):

3 **Other**

☑ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

☑ the nature and circumstances of the offense and the history and characteristics of the defendant

pursuant to 18 U.S.C. § 3553(a)(2)(A))

. . . . .

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use Section VIII if necessary.

DEFENDANT RAISED COMMUNITY SERVICE IN HIS SENTENCING MEMO AND ATTACHMENTS. SEE ATTACHMENT A.

ATTACHMENT A
STATEMENT OF REASONS/TALMUS R. TAYLOR

I find that defendant has provided exceptional and extraordinary community service as a music teacher in the Boston Public Schools in Dorchester, Massachusetts. Craig Lankhorst, his principal and a member of Superintendent Payzant's leadership team, and Robert Stutman, the head of the Boston Teachers' Union, testified strongly on his behalf. Letters were sent by parents of students he has taught, teachers and members of the St. Paul A.M.E. Church in Cambridge, including Professor Charles Ogeltree from Harvard Law School, and his Masonic community. Because of Taylor's leadership, the Fifield School is one of the few Boston Public Schools that has both a band and a chorus. Mr. Taylor works after school without extra pay in organizing these activities. He also helps manage the school, protects the after-school safety of children taking buses, and does fund-raising for events like taking the kids to the Boston Symphony Orchestra. He helped coach students in his free time for a ballet interpretation of Igor Stravinsky's Firebird.

Mr. Taylor is one of only two black male teachers in a school with many African-American boys who have few role models. According to one parent, "Mr. Taylor is more than a teacher in my eyes, but a great father figure for those who don't have a man to look up to." He brings kids to perform in nursing homes on the holidays, teaches music at the church, and has served on a committee to feed the hungry. A trumpet player and jazz musician who graduated from the Berklee School of Music, he provides free concerts to public interest groups.

On a personal level, for 15 years he has helped take care of a close friend with multiple sclerosis who came on crutches, with difficulty, to testify for Mr. Taylor at trial as a character witness.

This list of personal attributes is not meant to minimize the tax crime and lying in court. Because of significance of these crimes, I did not grant the defendant's request for home confinement. However, I find that pursuant to 18 U.S.C. §3553(a), a half-way house for one year with five years of probation, the requirement of five hours a week of community service (like teaching trumpet to children in under-serviced youth centers), and a $10,000 fine (with interest) will reasonably meet the goals of punishment, deterrence and protection to the public.

I fully respect the government's compelling argument that there is a need for uniformity, and a need to promote respect for the tax laws. I also recognize that the degree of departure from the sentencing range (30-37 months) is significant. In deciding the sentence, I took into account the persuasive evidence that any incarceration would likely disqualify him from ever serving as a teacher again. However, a half-way house will permit him to continue teaching. I am told by Probation that a half-way house will not take a defendant for longer than a year. Taking all the sentencing factors into account, I find that the sentence is sufficient but not greater than necessary, and that a departure under U.S.S.G. §5H1.11 and a variance under 18 U.S.C. §355(a) are warranted. Cf. United States v. Cacho-Bonilla, 404 F.3d 84, 95 (1st Cir. 2005).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	) Criminal
	) No. 05-
Plaintiff	) 10067-PBS
	) Pages 1-40
- VS -	)
	)
TALMUS TAYLOR,	)
	)
Defendant	)

SENTENCING HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

JOHN A. CAPIN, ESQ., Assistant United States Attorney, Office of the United States Attorney, 1 Courthouse Way, Boston, Massachusetts, 02210, for the Plaintiff.

BRUCE T. MACDONALD, ESQ., 678 Massachusetts Avenue, Suite 901, Cambridge, Massachusetts, 02139, for the Defendant.

ALSO PRESENT: Sean Buckley, United States Probation Department

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
July 12, 2006, 2:15 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 3205
Boston, MA 02210
(617) 345-6787

[33] . . . THE COURT: This is what I'm going to do: As Mr. Capin says, there is a value to uniformity. On the other hand, what the Supreme Court did was allowed me to consider what a reasonable sentence was, not just in terms of the Guidelines, which is were I start, but also in terms of the history and characteristics of the particular person appearing in front of me.

I have a particularly difficult sentence here **[34]** because the crime is a serious one. I think that Mr. Taylor was engaged in helping other people commit tax fraud, and he committed tax fraud himself by fabricating contributions for deductions from the tax forms.

In addition, in a way I thought was even more serious was, I do think he lied in court in his testimony, and lying under oath is not only a crime but not the morally correct thing to do. And I know that most of Mr. Taylor's life has been committed to important things like children and the church, and yet he did lie here on the stand, as did, I think, at least one other witness for him.

On the other hand, you can't help but read these letters, and it sort of actually reminds me of a movie I once saw. Somebody was a music teacher and

made a huge difference in children's lives, and it's quite clear here that he's done that. He's made a huge difference, and I got letters from parents, and I got letters from other teachers, and I got letters from colleagues in church. And you need to judge a person by the totality of that person's life, the good and the bad, and there's plenty of good, and there is some bad too.

So what I think the reasonable thing to do here, taking into account the fantastic contribution he's made to the community but also the perjury and the tax fraud, is that I think that a term in a halfway house would accommodate the **[35]** competing interests here, if you will.

A halfway house means he will not be living in his home. On the other hand, it means he will be able to teach, because one of the requirements and provisions of the halfway house is that you live in a place which acknowledges the fact you've committed a crime against society, but it is not behind bars, and it allows you to go out and teach and be a member of the community. You just return there at night.

So what I am going to do is a five-year term of probation, subject to one year in a halfway house. When he gets out of the halfway house, I am going to require for the rest of the term of probation, which is five years, five hours a week in community service. So hopefully he'll be able to take his skills as a teacher out into our difficult world right now in the city of Boston, and maybe teach some of those kids how to play the trumpet instead of going into a gang. And maybe he can use some of those community service skills in the church by taking that jazz band to places like the elderly or other churches.

I'm not here for narrowly constraining what he can do as a matter of community service but something outside the classroom, taking his

community service onto the streets. So that leaves it a bit up to Probation, but I primarily am interested in having him script, what was it, Stravinsky's The Firebird for lots of schools; for him to be able to go **[36]** out maybe to the Girls and Boys Club of Boston and provide music lessons to kids who want to play the trumpet; for him to be able to deal with as a father figure for so many kids, you know, I got letters about who don't have a dad at home, go out and play ball with them in the street, if that's what's going to make that kid happy.

So I think that I will impose - - this was a monetary crime. He made money by preparing these taxes. I will impose a penalty that I think is somewhat commensurate. I forget, the fine range was?

THE PROBATION DEPARTMENT: $6,000 to $60,000.

THE COURT: $6,000 to $60,000, so given the fact it's five years, I will impose a $10,000 penalty which will be paid out over the term of the five years, so it's $2,000 a year. And I will - - I don't know if I can instruct the IRS or whether I just request it. If the IRS ends up imposing fines on top of it, you could come back for a modification that makes it all commensurate. I'm imposing that fine on the assumption that the IRS will not be imposing criminal or civil penalties in addition to this. I can't be sure. I'm not talking about interest on his own fraudulent tax payments. I'm talking about something above and beyond that.

So I will also have to impose the term of the special assessment of $1,200. As special conditions of **[37]** release - -

THE PROBATION DEPARTMENT: $1,600.

THE COURT: $1,600, I'm sorry. As terms of special conditions of release, he's prohibited during

the five years from engaging in tax preparation work for anyone essentially other than himself, provide his own taxes, meet the financial conditions imposed by the Probation Office, and the community service thing I just talked about.

THE PROBATION DEPARTMENT: We would actually recommend the financial conditions while he's on fine - - while the fine is - -

THE COURT: Yes, that's right. Is there anything else on a special condition that I should be referencing? Is there anything that would be helpful? I'm wondering whether any of this has created any mental health issues or - -

MR. MACDONALD: It's been a lot of pressure, Judge, but I think he's handled it pretty well with the support of his friends and colleagues.

THE COURT: I was simply told right now that there is not a bed right in the halfway house, and there may not be for a while. I have no concern that there's a risk of flight. I certainly am not going to revoke him in the interim. And I'm going to make a three-week report time, but if a bed is not available, my goal is just to wait until there is a bed.

[38] MR. MACDONALD: Do you want him to continue reporting as he's been doing?

THE PROBATION DEPARTMENT: He'll be under the supervision of the Probation Office.

MR. MACDONALD: Okay. So there will be a different report schedule? He's been calling now every Wednesday or something. Until the bed opens up is what I'm saying.

THE COURT: Right. Where's Coolidge House? Do you know?

THE PROBATION DEPARTMENT: I think it's Roxbury.

MR. CAPIN: It's about a stone's throw from the Symphony Hall.

THE COURT: Convenient to the Berklee School and the Boston Symphony Orchestra. My intent is, of course, he can go to church on Sundays, since that's been an important part of his life, and the community service and school, and that he be able to participate in after-school activities that will benefit the community through the community service during this coming year. I don't know what the curfews are that are imposed and that sort of thing.

THE PROBATION DEPARTMENT: They're pretty flexible.

THE COURT: Okay, Mr. Alba?

THE CLERK: Will the defendant please stand. Mr. Talmus Taylor, the Court hereby notifies you of your right to appeal the sentence. If you cannot afford the cost **[39]** of an appeal, you may move to proceed in forma pauperis. If you cannot afford counsel for an appeal, one will be appointed for you. You are also notified that the Clerk of Court will file an appeal on your behalf if requested by you to do so. Any appeal from the sentence must be filed within ten days of entry of judgment on the docket. Do you understand these rights?

THE DEFENDANT: Yes.

THE CLERK: Thank you.

MR. CAPIN: Your Honor, I do have to object for the record. Could I ask for a clarification? Is this a - - this is the post-Booker litany – is this a deviation, or have you departed?

THE COURT: We don't like calling them "deviations" because I means the person who does that - -

MR. CAPIN: Is a deviant.

THE COURT: Is a deviant, right. So I guess what I'd like to say is, I believe that his level of service to the community is extraordinary community involvement which involves a traditional departure

ground. I also think that if for some reason the Appellate Court did not think that that was a traditional departure ground because they felt it doesn't rise to the level of extraordinary, I would do it on the basis of a variance on the history and characteristics of the offender and the need to impose a punishment that is [40] adequate but not –

THE PROBATION DEPARMENT: Adequate but not greater than necessary.

THE COURT: You got it -- to deter future activities. And I'm particularly not giving straight probation because I think that it's a serious crime, but I think that this is a way in which he can continue to give back to the community, and yet it will send that signal that the government was correctly worried about to the world that you can't commit tax fraud and commit perjury and basically get straight probation. . . .

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No. 07-388

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In the Supreme Court of the United States

TALMUS R. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that, in reversing his outside-Guidelines sentence of probation for aiding and abetting in the preparation of false tax returns, the court of appeals erroneously required the district court "to provide progressively more compelling justification under factors listed in 18 U.S.C. § 3553(a) the farther the judge's sentence departs from the United States Sentencing Guidelines." Pet. 7. As petitioner notes (Pet. 6), this Court has granted certiorari in *Gall* v. *United States*, No. 06-7949 (argued Oct. 2, 2007), to determine whether the strength of a justification for a non-Guidelines sentence must vary with the degree of the variance, and, in particular, whether extraordinary reasons are needed to justify a variance from the advisory range. Because the court of appeals applied the principle that "[t]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based

on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed," Pet. App. 13a (internal quotation marks and citations omitted), the resolution of *Gall* is likely to affect the proper disposition of this petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held pending this Court's decision in *Gall* v. *United States*, No. 06-7949, and then disposed of as is appropriate in light of that decision.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2007